

Below is an Order of the Court.


RANDALL L. DUNN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case
Timothy Joseph Mullen and) No. 06-33607-rld13
Amie Marie Mullen,)
Debtors.) MEMORANDUM OPINION

Debtors, Timothy Joseph Mullen and Amie Marie Mullen ("the Mullens"), filed their voluntary petition for relief under chapter 13 of the Bankruptcy Code¹ on November 16, 2006 ("Petition Date"), at which time the Mullens filed their chapter 13 plan, also dated November 16, 2006 ("Plan"). On March 8, 2007, I conducted a final hearing ("Hearing") on the objections of the chapter 13 trustee ("Trustee") to confirmation of the Plan ("Confirmation Objections"). At the conclusion of the

¹Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated as of October 17, 2005, the effective date of most of the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") (Pub. L. 109-8, April 20, 2005, 119 Stat. 23).

1 Hearing, I sustained the Confirmation Objections and advised the parties
2 that I would state my findings of facts and conclusions of law separately
3 in a written decision. This Memorandum Opinion constitutes those
4 findings of facts and conclusions of law, which I make pursuant to Fed.
5 R. Civ. P. 52(a), applicable in this contested matter pursuant to Fed. R.
6 Bankr. P. 9014. I have core jurisdiction to resolve plan confirmation
7 issues pursuant to 28 U.S.C. §§ 1334(b), 157(a), 157(b)(1), and
8 157(b)(2)(L).

9 10 Background

11 The Mullens concede that their gross income in the six months
12 prior to the Petition Date exceeded the Oregon median income for their
13 household size. They also concede in their Chapter 13 Statement of
14 Current Monthly Income and Calculation of Commitment Period and
15 Disposable Income ("Form B22C") that the "applicable commitment period"
16 therefore is five years, and they assert that their "disposable income"
17 is to be determined by subtracting from their gross income "the amounts
18 mandated by § 1325(b)(3)." Further, the Mullens point out that they both
19 are in "career" positions, such that their levels of income will be
20 stable throughout the case. The Mullens' Schedules I and J reflect that
21 they have \$396.00 net monthly income to contribute to their Plan, and in
22 fact the Mullens commit to pay \$396.00 into the Plan each month for the
23 Plan duration. The Mullens take the position, however, that because
24 their "monthly disposable income" reflected on line 58 of Form B22C is
25 \$103.13, payment of \$6,187.80 (\$103.13 x 60) satisfies the payment
26 requirements under § 1325(b). Accordingly, they add to the standard

chapter 13 form plan in use in this district a provision which states that they are entitled to their discharge and to have the case closed upon (1) payment of all administrative and priority debts, and (2) payment of \$6,187.80 to general unsecured creditors. This provision anticipates that the foregoing conditions to discharge will be satisfied prior to month 60, in approximately month 25 according to the Trustee.

The Trustee objects, asserting that the "applicable commitment period" set forth in §§ 1325(b)(1)(B) and (b)(4) requires that plan payments be made for a full 5 years. The Trustee further asserts that the "current monthly income" set forth on the Mullens' Form B22C does not accurately reflect their disposable income, which should include any tax refunds that the Mullens receive during the "applicable commitment period." Finally, the Trustee contends that in calculating "projected disposable income," § 1325(b)(3) should apply such that standard expenses as set forth in IRS guidelines will be used.

Discussion

As relevant to the matter before me, § 1325(b)(1) provides:

If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan -

(B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

Because the Trustee has objected to confirmation of the Plan, § 1325(b)(1)(B) precludes confirmation unless I find that the plan provides that all of the Mullens' "projected disposable income" to be

1 received during the "applicable commitment period" will be applied to
2 make payments to unsecured creditors under the Plan. In determining
3 whether to confirm the Plan, I must decide the following issues. First,
4 I must decide whether the "applicable commitment period" requires that
5 the Mullens actually make payments under a plan for a period of five
6 years or sixty calendar months. Second, I must decide if the proposed
7 Plan commits all of the Mullens' "projected disposable income," to Plan
8 payments during the "applicable commitment period." In determining
9 "projected disposable income," I must address a subset of at least two
10 issues: whether "projected disposable income" is effectively synonymous
11 with "disposable income;" and whether the Mullens must commit, as part of
12 their "projected disposable income," payment of their tax refunds to the
13 Plan for the "applicable commitment period."

14 15 Applicable Commitment Period

16 As noted above, the first issue I must decide in determining
17 whether I can confirm the Plan is whether the "applicable commitment
18 period" provisions of the Bankruptcy Code mandate that payments be made
19 for a full five years.

20 Section 1325(b)(4), as relevant to the case before me,
21 provides:

22 For purposes of this subsection, the 'applicable commitment
23 period' -

24 (A) subject to subparagraph (B), shall be --

25 (i) not less than 5 years, if the current monthly income of
the debtor and the debtor's spouse combined, when multiplied by
12, is not less than --

26 (II) in the case of a debtor in a household of 2, 3, or 4

1 individuals, the highest median family income of the
2 applicable State for a family of the same number or fewer
individuals

3 (B) may be less than 3 or 5 years, whichever is applicable under
4 subparagraph (A), but only if the plan provides for payment in
full of all allowed unsecured claims over a shorter period.

5 Because the Mullens are above-median income debtors, the Trustee
6 asserts that in accordance with § 1325(b)(4)(A), the Plan cannot be
7 confirmed unless the Mullens make plan payments over a period of time
8 that is not less than five years. The Mullens assert that "applicable
9 commitment period" is not a temporal requirement. Instead, it mandates
10 the amount to be paid to unsecured creditors under the Plan.
11 Accordingly, the Mullens contend that so long as they pay into their plan
12 an amount that provides their unsecured creditors with their "disposable
13 income" each month, multiplied by 60 in order to capture the amount of
14 "disposable income" they are "projected" to receive over the next five
15 years, they satisfy the "applicable commitment period" requirement. In
16 the Mullens' view, the fact that they might pay the total amount they owe
17 under the Plan on an accelerated basis is irrelevant.

18 The same issue was before the court in In re McGuire, 342 B.R.
19 608, 615 (Bankr. W.D. Mo. 2006):

20 Phrased succinctly, the question is whether ["applicable
21 commitment period"] is a multiplier rather than a time period,
i.e., whether it is a "monetary" or a "temporal" requirement.

22 The problem with the Mullens' position is that it is
23 inconsistent with the provisions of BAPCPA. I agree with the analysis
24 of the court in In re Schanuth, 342 B.R. 601, 607 (Bankr. W.D. Mo.
25 2006), that the plain language of § 1325(b)(4)(B) supports a temporal
26 interpretation of the phrase "applicable commitment period." Section

1 1325(b)(4)(B) expressly articulates the conditions under which the Plan
2 may be less than five years. Specifically, § 1325(b)(4)(B) authorizes
3 confirmation of a plan with a shorter payment period than five years
4 only if the plan provides for payment in full of all allowed unsecured
5 claims over the shorter period. Here, the Plan does not provide for
6 payment in full of all allowed unsecured claims.

7 In light of the express temporal limit recognized in
8 § 1325(b)(4)(B), I join those courts which have accepted that
9 "applicable commitment period" is a temporal concept. Most of these
10 courts base their holdings on the plain meaning of the term "applicable
11 commitment period" because interpreting "applicable commitment period"
12 as a temporal concept is not patently absurd. For example, the court in
13 In re Slusher, 2007 WL 118009 at *8 (Bankr. D. Nev. 2007), stated:

14 . . . '[P]lain meaning' is indeed the tool that must be used to
15 analyze the statute. . . . The code provides no specific
16 definition of the words "applicable," "commitment," or "period."
17 However, the dictionary gives the following definitions:
18 Applicable: fit or suitable for its purpose; appropriate.
19 Commitment: the committing of oneself . . . (to a particular
20 course of conduct). Period: a length of time. Taken together
21 in the context of the Bankruptcy Code, "applicable commitment
22 period" thus stands for the appropriate length of time during
23 which the debtor has agreed to make payments.

24 See also, e.g., In re Girodes, 350 B.R. 31, 35 (Bankr. M.D.N.C.
25 2006)("The use of the term 'period' implies time period rather than
26 amount."); In re Alexander, 344 B.R. 742, 751 (Bankr. E.D.N.C. 2006)("If
Congress wanted the 'applicable commitment period' to function as a
multiplier it could have so stated."); In re Dew, 344 B.R. 655, 661-62
(Bankr. N.D. Ala. 2006)("It is impossible to read sections 1322(d)(2),
1325(b)(4)(A) and 1329(c) and conclude the Bankruptcy Code contemplates

1 something other than a defined length of time for payments to be made
2 under a chapter 13 plan, i.e. the applicable commitment period."); In
3 re McGuire, 342 B.R. at 615 ("[A] monetary interpretation of
4 ['applicable commitment period'] renders § 1325(b)(4)(B) meaningless.");
5 In re Schanuth, 342 B.R. at 607 ("The term itself, 'applicable
6 commitment period,' contains a word with temporal meaning: 'period'
7 means 'chronological division.'"); In re Beasley, 342 B.R. 280, 284
8 (Bankr. C.D. Ill. 2006) ("[T]he statutory formulas and Form B22C do lead
9 to a fully-dispositive calculation of the applicable commitment period.
10 When the calculation is complete, a debtor is directed to a three-year
11 or five-year commitment period, and no further analysis is suggested,
12 required, or allowed by any portion of the relevant statutes. If
13 Congress had desired to build flexibility into the determination of the
14 applicable commitment period, it could have done so.").

15 Further, as stated by the court in In re Davis, 348 B.R. 449,
16 457 (Bankr. E.D. Mich. 2006):

17 What little legislative history does exist strongly suggests
18 that Congress intended the applicable commitment period to
19 impose a minimum length of a plan, not a multiplicand as Debtor
asserts, as the following House report shows:

20 Sec. 318. Chapter 13 Plans to Have a Five-Year Duration in
Certain Cases. Paragraph (1) of § 318 of the Act amends
21 Bankruptcy Code §§ 1322(d) and 1325(b) to specify that a
chapter 13 plan may not provide for payments over a period
22 that is not less than five years if the current monthly
income of the debtor and the debtor's spouse combined
exceeds certain monetary thresholds. . . . The applicable
23 commitment period may be less if the plan provides for
payment in full of all allowed unsecured claims over a
24 shorter period. Section 318(2), (3) and (4) make conforming
amendments to §§ 1325(b) and 1329(c) of the Code.

25 I find unpersuasive the reasoning of the limited authorities
26

1 which have rejected the interpretation of "applicable commitment period"
2 as a strictly temporal concept. See, e.g., In re Fuger, 347 B.R. 94, 99
3 (Bankr. D. Utah 2006) ("[T]he term 'applicable commitment period' is
4 both a monetary and a temporal provision. It is monetary in the sense
5 that it has always required debtors to commit to pay unsecured creditors
6 a set return. It is temporal in the sense that it has always required
7 debtors to determine that return by projecting over a specific time
8 period, and it provides debtors with a time limit for performing under a
9 chapter 13 plan."). See also, KEITH M. LUNDIN, Chapter 13 Bankruptcy
10 § 500.1, p. 500-2 (3d ed. Bankruptcy Press 2000 & Supp. 2006):

11 Under § 1325(b)(1), the applicable commitment period is a number
12 of years that is multiplied by annualized disposable income to
13 determine the amount of projected disposable income that must be
14 paid to unsecured creditors to satisfy the confirmation test in
15 § 1325(b)(1). The applicable commitment period does not require
that the debtor actually make payments for any particular period
of time. Rather, it is the multiplier in a formula that
determines the *amount* of disposable income that must be paid to
unsecured creditors.

16 Because the Mullens are above-median income debtors, the
17 "applicable commitment period" in their chapter 13 case is five years.
18 Paragraph 12 of the Plan provides:

19 Debtors are entitled to a discharge and closing of this case
20 once all administrative and priority debts are paid and general
21 unsecured creditors have received a total of \$6,187.80 (Debtors'
projected disposable income (\$103.13 X 60)).

22 In addition, the Mullens have not completed the blank in Paragraph 8 of
23 the form Plan to state that the length of the Plan is 60 months. Since
24 Paragraph 12 is inconsistent with the required "applicable commitment
25 period" of five years in this case, I find that the Trustee's objection
26 is well taken, and I will sustain the Trustee's objection on the

1 "applicable commitment period" ground.

2
3 Projected Disposable Income

4 Pre-BAPCPA, "projected disposable income" was interpreted by
5 statute and case law to be, in effect, "income not reasonably necessary
6 for maintaining or supporting the debtor or a dependent, with that
7 determination being made on an estimated basis at plan confirmation." In
8 re Slusher, 2007 WL 118009 at *2 (Bankr. D. Nev. 2007). In the absence
9 of statutory definition or specification, what constituted a "reasonably
10 necessary" expense for purposes of calculating disposable income, was
11 determined on a case-by-case basis. See id. In most cases, disposable
12 income was determined by subtracting the debtor's monthly expenses, as
13 set forth on Schedule J, from the monthly income stated on the debtor's
14 Schedule I.

15 In enacting BAPCPA, Congress revised the § 1325(b)(2)
16 definition of disposable income and created § 1325(b)(3) to provide
17 guidelines for reasonably necessary expenses. For below-median income
18 debtors, "projected disposable income" still "is based on a debtor's
19 current income and expenses as reflected on Schedules I and J." In re
20 Kibbe, 342 B.R. 411, 415 (Bankr. D.N.H. 2006). At issue in this case,
21 involving above-median income debtors, is to what extent the BAPCPA
22 changes limit the court's discretion in determining the Mullens'
23 "projected disposable income" to be paid into the Plan.

24 ///

25 ///

26 ///

1. "Projected Disposable Income" Is Not Synonymous With
"Disposable Income"

The meaning of "projected disposable income" under BAPCPA has been the subject of numerous court decisions since BAPCPA's relatively recent effective date. With limited exceptions, the courts confronted with interpreting the meaning of "projected disposable income" under BAPCPA have held that it is not unambiguous, thereby giving rise to the application of general canons of statutory construction, going beyond "plain meaning." In applying these canons, most courts have held that the terms "disposable income," as defined by § 1325(b)(2), and "projected disposable income," as used in § 1325(b)(1)(B), are not necessarily synonymous. In re Slusher, 2007 WL 118009 (Bankr. D. Nev. 2007).

To hold otherwise renders the word "projected" surplusage, as used not only in § 1325(b)(1)(B), but also in §§ 1222(a)(4), 1225(b)(1)(B), 1225(b)(1)(C), and 1322(a)(4).

For a debtor not engaged in business, § 1325(b)(2) provides:

For purposes of this subsection, the term "disposable income" means current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended -

(A)(i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and

(ii) for charitable contributions . . . in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made

Since "disposable income" is defined in BAPCPA while "projected" and "projected disposable income" are not, the courts are left to

1 determine how the word "projected" modifies or changes "disposable
2 income."

3 Generally speaking, "disposable income" for BAPCPA purposes
4 is the calculation, based upon a six-months average of historical
5 current monthly income (see § 101(10A)) and uniform expense data,
6 which is used primarily to determine whether a chapter 7 case is an
7 "abuse." Adding "projected" to the phrase transforms it to a
8 forward-looking concept. See Anderson v. Satterlee (In re Anderson),
9 21 F.3d 355, 357 n.5 (9th Cir. 1994). While Anderson interprets
10 "projected" disposable income pre-BAPCPA, its analysis regarding
11 "projected" as a modifier of disposable income remains valid.²

12 In reaching this conclusion, several courts have noted
13 that, in enacting BAPCPA, Congress chose not to define "projected
14 disposable income," despite the body of case law, including Anderson,
15 which addressed the distinction between "projected disposable income"
16 and "disposable income" in the pre-BAPCPA versions of section
17 1325(b)(1)(B) and section 1325(b)(2). In re Jass, 340 B.R. 411, 417
18 (Bankr. D. Utah 2006) ("Congress changed the definition of
19 'disposable income' under § 1325(b)(2), replacing it with a specific
20 and detailed definition. Despite these detailed changes, Congress

21
22 ²Before the BAPCPA effective date, "projected disposable income"
23 usually was calculated by multiplying the difference between Schedule I
24 income and Schedule J expenses by the estimated length of the Plan,
25 consistent with the requirement of § 1322(a)(1) that the debtor commit
26 "such portion of future earnings or other future income of the debtor to
the supervision and control of the trustee as is necessary for the
execution of the plan." Neither the term "projected disposable income"
in § 1325(b)(1)(B) nor the commitment of future income requirement of
§ 1322(a)(1) was amended by BAPCPA.

1 did not remove the word 'projected' from § 1325(b)(1)(B), nor did it
2 add the word 'projected' to the term 'disposable income' carefully
3 defined by § 1325(b)(2). The Court can only conclude that the
4 available evidence of Congressional intent underlying § 1325(b)
5 bolsters its holding that the number resulting from Form B22C is not
6 always a debtor's 'projected disposable income.'"); In re Slusher,
7 2007 WL 118009 at *4 ("Because the operative language in Section
8 1325(b)(1)(B) did not change - the statute referred and refers to
9 'projected disposable income' both before and after BAPCPA - Anderson
10 provides the presumptive answer for the proper construction of the
11 term."); see also BFP v. Resolution Trust Corp., 511 U.S. 531, 537
12 (1994) ("Congress acts intentionally and purposefully when it
13 includes particular language in one section of a statute but omits it
14 in another.").

15 In interpreting the meaning of "projected disposable
16 income," courts have looked for clues in other provisions of the
17 Bankruptcy Code and in considering the overall framework and
18 interlocking operation of provisions of the Bankruptcy Code. For
19 instance, the court in In re Hardacre, 338 B.R. 718, 722-23 (Bankr.
20 N.D. Tex. 2006), determined that the language "to be received" and
21 "as of the effective date of the plan" in § 1325(b)(1) necessitated a
22 conclusion that "projected disposable income" "must be based upon the
23 debtor's anticipated income during the term of the plan, not merely
24 an average of her prepetition income." See also In re Grady, 343
25 B.R. 747, 752 (Bankr. N.D. Ga. 2006):

26 Considering that the Bankruptcy Code permits a debtor to

1 modify the confirmed plan if his financial condition changes,
2 it appears Congress, by using the term "projected disposable
3 income" in section 1325(b)(1)(B), intended courts to consider
4 a debtor's disposable income at the time of
confirmation. . . . If the Debtors are required to pay the
disposable income as calculated on [Form B22C] only, they
would not be able to modify the plan under section 1329(a).

5 The latter point made in Grady is particularly compelling
6 because § 1329 provides that "the debtor, the trustee, or the holder
7 of an allowed unsecured claim" may propose a plan modification "at
8 any time after confirmation of the plan." If the measure of the
9 debtor's required commitment of "projected disposable income" to plan
10 payments is a mere multiple of the historical calculation of
11 "disposable income" under §§ 1325(b)(2) and (3), what principled
12 basis is there for allowing a debtor to modify a plan to reduce plan
13 payments based on a postpetition reduction in debtor's income?
14 Likewise, what basis is there to approve a plan modification proposed
15 by the trustee or an unsecured creditor based on an increase in the
16 debtor's income, no matter how great, at any time from the petition
17 date forward during the pendency of the chapter 13 case? The
18 Mullens' interpretation of "projected disposable income" would
19 effectively read § 1329 out of the Bankruptcy Code in many of its
20 applications.

21 However, in In re Kagenveama, 2006 Bankr. LEXIS 2729
22 (Bankr. D. Ariz. 2006), the court rejected the conclusion of the
23 majority of courts, which have decided that "projected disposable
24 income" in § 1325(b)(1)(B) is not effectively synonymous with
25 "disposable income" in § 1325(b)(2).

26 The difficulty is that such an interpretation flies in the face

1 of the plain words of the statute. Care was taken by Congress to
2 modify the old definition of disposable income and to replace it
3 with one based upon "current monthly income." This is clear;
4 there can be no doubt about it. Section 1325(b)(2) states what
5 the definition of "disposable income" is "for the purposes of
6 this subsection"; nowhere else, other than in Section
7 1325(b)(1)(B), do the words "disposable income" appear in the
8 referenced subsection. Unless the definition applies to
9 "projected disposable income," it has no meaning.

10 Kagenveama at *5 (italics in original). The Kagenveama court conceded
11 that the pre-BAPCPA reliance on Schedules I and J would yield "a more
12 reality-based number" for projected disposable income in the case before
13 it, recognizing implicitly that the application of the plain meaning in
14 that instance leads to an absurd result:

15 However, Congress has chosen not to rely on I and J,
16 notwithstanding their proven utility, and that is Congress'
17 choice to make. But this case illustrates the problems caused by
18 this approach. Debtor's Schedules I and J yield "disposable
19 income" of \$1,523.89; however, "disposable income" as shown on
20 Debtor's B22C form is a -\$4.04. Given the stated purposes of
21 BAPCPA, it is both ironic and unfortunate that this Debtor with
22 resources available to pay unsecured creditors will not be
23 required to do so in this case.

24 Kagenveama at *6-7.

25 Similarly, the court in In re Alexander, 344 B.R. 742, 749
26 (Bankr. E.D. N.C. 2006) also used a "plain meaning" interpretation of
27 §§ 1325(b)(1)(B) and 1325(b)(2) and held that "in order to arrive at
28 'projected disposable income,' one simply takes the calculation mandated
29 by § 1325(b)(2) and does the math." In reaching its conclusion, the
30 Alexander court reasoned:

31 Both "projected disposable income" and "disposable income" fall
32 under subsection (b) of § 1325. First, (b)(1) states that
33 projected disposable income is to be applied toward unsecured
34 creditors under the plan. Then (b)(2) states "For purposes of
35 this subsection, the term 'disposable income' means"
36 [citation omitted]. If "disposable income" is not linked to
37 "projected disposable income" then it is just a floating

1 definition with no apparent purpose.

2 Id.

3 The result in Kagenveama clearly demonstrates the problem with
4 interpreting the term "projected disposable income" as a mere multiple of
5 "disposable income." Chapter 13 is not some alternative universe where
6 reality dare not intrude. Further,

7 It makes little sense for Congress to include in the Bankruptcy
8 Code the flexibility provided by §§ 1323 and 1329 permitting
9 modification of a plan when a debtor's financial circumstances
10 change, thus assisting both debtors in completing their plans
11 when their circumstances change for the worse and creditors in
obtaining increased payments when a debtor's circumstances
improve, but not to provide for a realistic determination of the
debtor's ability to make payments in the first place.

12 In re Zimmerman, 2007 WL 295452 (Bankr. N.D. Ohio 2007).

13
14 2. The Calculation of Projected Disposable Income

15 The majority view appears to be that the current monthly income
16 on Form B22C creates a presumption of a debtor's projected disposable
17 income. See, e.g., In re Foster, 2006 WL 2621080 (Bankr. N.D. Ind.
18 2006); In re Risher, 344 B.R. 833, 836 (Bankr. W.D. Ky. 2006); In re
19 Grady, 343 B.R. at 753; In re McGuire, 342 B.R. at 615; In re Jass, 340
20 B.R. at 416.

21 I adopt the position of those courts which have held that the
22 number from line 58 of Form B22C, incorporated into the "disposable
23 income" definition in § 1325(b)(2), generally is presumptive of
24 "projected disposable income," as consistent with the language of BAPCPA
25 in § 1325(b) and congressional intent.

26 However, in this case, there is evidence submitted by the

1 Mullens themselves, to rebut the presumption that the Form B22C
2 calculation of "disposable income" should be the measure of "projected
3 disposable income": The Mullens are in stable employment situations and
4 do not project that their future incomes will vary materially. The
5 Mullens proposed as their periodic payment during the life of their Plan
6 \$396 a month, which equals the difference between their Schedule I income
7 and their Schedule J expenses. Frankly I find it disingenuous of the
8 Mullens to argue that their "disposable income" for chapter 13 plan
9 confirmation purposes is \$103.13 per month, while proposing the Plan with
10 a fixed monthly payment of \$396.00 for the life of the Plan. I,
11 therefore, hold that the presumption that the Mullens' "disposable
12 income," as calculated on their Form B22C, should be used to calculate
13 their "projected disposable income" has been overcome by the evidence of
14 the larger periodic payment the Mullens proposed and agreed to pay into
15 the Plan.³ See e.g., In re Zirtzman, 2006 WL 3000103 at *4 (Bankr. N.D.
16 Iowa 2006) ("[B]ecause Debtors and Trustee agree that Debtors have
17 monthly net income of \$300 to pay into the plan, this amount is their
18 projected disposable income under § 1325(b)(1)(B)."). This holding
19 provides a further basis to sustain the Trustee's objection to
20 confirmation of the Plan.

21 _____
22 ³While the proposed payment, coincidentally or not, is the
23 disposable income number derived from subtracting the Mullens' Schedule J
24 expenses from Schedule I income, for purposes of this decision, I need
25 not reach the issue of whether Schedule J ever can or should be used as
26 the basis for the expense component of "projected disposable income" in
an above-median income debtor BAPCPA case. I decide only that the
periodic Plan payment proposed by the Mullens rebuts the presumption that
the Form B22C number provides the definitive basis for calculating the
Mullens' "projected disposable income."

1 3. Tax Refunds are a Component of "Projected Disposable Income"
2 During the "Applicable Commitment Period"

3 I previously held in a pre-BAPCPA case that pre- and post-
4 petition tax refunds represented future income or future earnings which
5 constituted projected disposable income that debtors were required to pay
6 into their plans pursuant to § 1322(a)(1) and § 1325(b)(1)(B). In re
7 Schiffman, 338 B.R. 422 (Bankr. D. Or. 2006). I hold now that Schiffman
8 remains applicable under BAPCPA. See In re Balcerowski, 353 B.R. 581
9 (Bankr. E.D. Wisc. 2006); In re Risher, 344 B.R. 833, 837 (Bankr. W.D.
10 Ky. 2006):

11 Debtors herein contend that one of the categories of expenses
12 that they are allowed to deduct under 11 U.S.C.
13 § 702(b)(2)(A)(ii), is federal, state and local taxes,
14 referencing question 30 on Form B22C. Actually, this section
15 references a deduction for the federal, state and local taxes
16 actually paid. Trustee is correct that taxes actually paid are
not equivalent to what is withheld from a debtor's paycheck for
taxes. Tax refunds represent amounts overwithheld and thus,
constitute additional income. Debtors' argument that the taxes
are already captured in the disposable income calculations is
misplaced.

17 This conclusion is based on the reality that in most instances, a debtor
18 who receives a substantial tax refund has overwithheld tax payments from
19 income. Such overwithholding reduces disposable income that otherwise
20 would be available for plan payments if the related refunds are not paid
21 into the plan. The Mullens did not provide any evidence that they were
22 not and would not be overwithholding taxes during the term of the Plan.

23
24 Conclusion

25 Under BAPCPA, for above-median income debtors, the "applicable
26 commitment period" requires a stream of payments for a term of five years

1 (60 months), unless the allowed claims of unsecured creditors are paid in
2 full prior to the end of the "applicable commitment period." The
3 presumption that the debtors' "disposable income" determines their
4 "projected disposable income" can be overcome by contrary evidence, as
5 submitted in this case. Finally, tax refunds which debtors receive
6 during the pendency of their case are a component of their "projected
7 disposable income," unless the debtors present sufficient controverting
8 evidence.

9 As stated at the Hearing, I will enter an order denying
10 confirmation of the Plan, and allowing the Mullens 28 days within which
11 to file a modified plan.

12 ###

13 cc: Rex K. Daines
14 Brian D. Lynch, Trustee
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